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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KIMBERLYN D. HOLT, a minor, by and through KIMBERLY R. HOLT and KENNETH F. HOLT, her parents, natural guardians and next friends; and KIMBERLY R. HOLT and KENNETH F. HOLT, individually,	)	
Plaintiffs,	)	
v.	)	**Case No. 00-1318-JAR**
WESLEY MEDICAL CENTER, LLC, a Kansas Corporation, d/b/a/ WESLEY MEDICAL CENTER; WICHITA CENTER FOR GRADUATE MEDICAL EDUCATION, INC., a Kansas Corporation; BENJAMIN J. HARRIS, M.D.; CLIFFORD S. DEPEW, M.D.; JAMES E. DELMORE, M.D.; and TRAVIS W. STEMBRIDGE, M.D.,	)	
Defendants.	)	

MEMORANDUM AND ORDER DENYING DEFENDANT WESLEY MEDICAL CENTER'S *DAUBERT* MOTION AND GRANTING AND DENYING IN PART WESLEY MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT

This medical malpractice action comes before the Court on defendant Wesley Medical Center's (Wesley) *Daubert* Motion (Doc. 296) and Motion for Summary Judgment (Doc. 297). In its *Daubert* Motion, Wesley requests exclusion of plaintiffs' expert witnesses' testimony on nurse understaffing. Wesley also seeks partial summary judgment on plaintiffs' claims of: (1) nurse understaffing; (2) joint enterprise; (3) breach of contract; and (4) punitive damages. For the reasons stated below, Wesley's *Daubert* motion is denied and Wesley's summary judgment

motion is granted in part and denied in part.

I. Facts

The following facts are either uncontroverted or related in the light most favorable to the nonmoving party. On July 29, 1998 at 5:05 p.m., Kimberly Holt was admitted to Wesley for an elective induction of labor. On July 30, 1998, at 5:12 p.m., the baby, plaintiff Kimberlyn D. Holt, was delivered by emergency cesarean section. Kimberlyn was born limp and pale without spontaneous respirations and today suffers from permanent brain damage. In addition, Mrs. Holt's uterus was ruptured and her bladder, cervix and vagina were severely lacerated.

Mrs. Holt entered into an admission agreement with Wesley upon her arrival at the hospital. The admission agreement provided:

> RESIDENTS: I understand that Columbia Wesley is a teaching institution in which residents (licensed physicians engaged in special training) participate in patient care and treatment under supervision of attending physicians. I agree to having residents participate in my care and treatment as part of their specialty training. If I object to resident involvement in my care, I will discuss this with my attending physician.

Resident physicians, and nurses, including Nurse Finley and Nurse Betzen, participated in Mrs. Holt's care.

On August 22, 1998, approximately three weeks after Mrs. Holt's labor and delivery, an addendum to her medical records was prepared by Nurse Finley. The addendum modified Mrs. Holt's July 30, 1998 medical records to include three specific reports to Dr. Harris by Nurse Finley of low urine output and bloody urine at 11:55 a.m., 12:45 p.m., and 1:50 p.m., respectively. The addendum also included a report of left-sided break through pain while block levels were equal at 1:50 p.m. In her deposition, Nurse Finley stated that the addendum was

prepared for liability reasons, not for Mrs. Holt's well-being.

Plaintiffs offer two experts on the issue of nurse understaffing: Dr. Phelan and Nurse Lundstrom. As an obstetrician-perinatologist, Dr. Phelan works with nurses on a regular and ongoing basis, and has taught nursing classes in the past. On occasions when there have been insufficient nurses on the labor and delivery floor, he has called nurses from home and asked them to come to the hospital. He has assisted in completing a nurse staffing schedule for critically ill pregnant women. Dr. Phelan has also authored policies on the staffing of an obstetrics unit dealing with critically ill pregnant women at two hospitals in his capacity as co-director of maternal-fetal medical.

In his deposition, Dr. Phelan testified that in this case one-on-one nursing "clearly was indicated. One on-one the whole time." When asked why one-on-one nursing was required, Dr. Phelan stated: "Well, she was on Pitocin, for one. She's - - that would be, in and of itself, sufficient basis because of all the monitoring requirements attendant to that." In addition, Dr. Phelan identified the time when the one-on-one nursing should have begun:

> Q. What time was that?
> A. [Cervidil] was started on the 29th of July at 1900. That is one-on-one. And then you start the Pitocin at 2315; that's pretty much it. So that is one-on-one.
> Q. You believe that 1900 on, it should have been one-on-one care?
> A. Especially if someone receives Cervidil. And now I have her on Pitocin at 2315. It would have been one-on-one.

Dr. Phelan testified that Mrs. Holt did not receive one-on-one care throughout her labor and delivery. Specifically, he noted that Nurse Betzen had two patients during her shift and that Nurse Finley was acting as a charge nurse and leaving Mrs. Holt unattended for periods of time and that the lack of one-on-one care contributed to Kimberlyn's injuries. In his expert report

dated February 19, 2002, Dr. Phelan stated that:

> It is in my opinion that there was, indeed nurse 'understaffing' on the part of the defendant Wesley Medical Center, based on an evaluation of 'patient acuity/classification' and the lack of 'continuity of patient care.' Mrs. Holt was a 'High Risk' or 'Special Needs' patient. It is further my opinion, to a degree of medical probability, that this nurse 'understaffing' caused and/or contributed to the eventual outcome in this case.

Nurse Lundstrom is a registered nurse, as well as a nurse practitioner. As a head nurse, charge nurse and staff nurse at Children's Mercy Hospital from 1973-1979, she made nursing assignments. Nurse Lundstrom also made assignments at the newborn intensive unit at Wesley from 1979-1989. Additionally, she has attended seminars on leadership and management, which included discussions of nurse staffing.

Nurse Lundstrom prepared two expert reports. In preparation for her first report, she consulted: (1) Mrs. Holt's and Kimberlyn Holt's medical records; (2) fetal monitor strips; (3) the depositions of Drs. Depew, Harris, and Klingler; and (4) the depositions of nurses Finley, Betzen, Denton, Dudley and Harder. After being asked to render an opinion on nurse understaffing, Nurse Lundstrom prepared a second expert report, dated February 13, 2002. In addition to the information reviewed in preparation for her first report, Nurse Lundstrom reviewed: (1) a letter from John Gibson date 3/5/01; (2) the patient assignment list from 7/29/98; (3) the nursing Birthroom records of a second patient cared for by Nurse Betzen while attending Mrs. Holt; (4) five Wesley Medical Center Nursing Policies; and (5) Guidelines for Perinatal Care, and Fetal Heart Rate Monitoring: Principles & Practice.

In her deposition, Nurse Lundstrom testified that there was either nurse understaffing or bad nursing care at Wesley during Mrs. Holt's labor and delivery. She based her opinion on Mrs.

Holt's medical charts, which showed that nurses failed to take and record vital signs as required by nursing policies, the patient assignment lists showing that a nurse assigned to Mrs. Holt was also assigned to a different patient, and frequent nurse staff changes. Nurse Lundstrom testified that she was unaware of any testimony that a nurse not being at Mrs. Holt's bedside interfered with the physician's ability to provide care, but that, in her opinion, the lack of one-on-one nursing did interfere with Mrs. Holt's care.

Nurse Lundstrom also opined that Wesley's nurses acted in a wanton manner in her first expert report dated September 30, 2001. In her report, she stated:

> I found it especially egregious that as early as 5:20 a.m., nearly 12 hours before the infant was delivered, the nurse increased the Pitocin despite the ominous sign of a repetitive late deceleration pattern. The lowest standard of care would have been to stop the Pitocin at that time. Instead, the Pitocin was recklessly increased, showing total disregard for the well-being of the fetus and the mother.
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> * * *
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> Of additional concern is the fact that over five liters of fluid were given to Mrs. Holt with almost no urine return. When fluid was obtained it was grossly bloody and of small volume. Not relaying this abnormal information to the attending physician was reckless and falls far below the acceptable care practices of nurses, regardless of the area in which they work.

II. *Daubert* Motion

A. Legal Standard

Federal Rule of Evidence 702 imposes upon the trial judge an important "gatekeeping" function with regard to the admissibility of expert opinions.[1] Expert testimony is admissible only

[1] *See generally Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 141 (1999) (citing *Daubert,* 509 U.S. 579).

if it is both relevant and reliable.[2] The Supreme Court has held that Rule 702 imposes a special obligation upon a trial judge to ensure that all expert testimony, even non-scientific and experience-based expert testimony, is both relevant and reliable.[3] In order to determine whether an expert's opinion is admissible, the court must undergo a two-step analysis. First, the court must determine whether the expert was qualified by "knowledge, skill, experience, training or education" to render an opinion. The dispositive question with regard to qualification is whether the opinion is "within the reasonable confines" of the expert's subject area.[4]

Second, if the expert is so qualified, the court must determine whether his opinions were "reliable" under the principles set forth under *Daubert* and *Kumho Tire.*[5] Reliability analysis applies to all aspects of the expert's testimony, including the facts underlying the opinion, the methodology, and the link between the facts and the conclusion drawn.[6] Consequently, the court must make a practical, flexible analysis of the reliability of the testimony considering relevant factors in the circumstances of the case.[7]

An expert may offer an opinion even if it "embraces an ultimate issue to be determined by the trier of fact."[8] Even after *Daubert*, rejection of expert testimony has been the exception

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[2]*Id.*

[3]*United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001) (citing *Kuhmo*, 526 U.S. at 147).

[4]*Burton v. R.J. Reynolds Tobacco Co.,* 183 F. Supp. 2d 1308, 1313-1314 (D. Kan. 2002).

[5]*Ralston v. Smith & Nephew Richard, Inc.,* 275 F.3d 965, 969 (10th Cir. 2001).

[6]*See Heller v. Shaw Indus., Inc.,* 167 F.3d 146, 155 (3d Cir. 1999).

[7]*See, e.g.*, *Kumho Tire,* 526 U.S. at 149-52; *Heller,* 167 F.3d at 155.

[8]Fed. R. Evid. 704.

rather than the rule.[9] "Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[10] Nonetheless, an expert may not simply tell the jury what result it should reach.[11]

B. Discussion

Wesley argues that pursuant to Rule 702 and *Daubert*, Nurse Lundstrom is not qualified as an expert, and that even if she is qualified, she has no evidence to support her expert opinion regarding obstetrical nursing such that her opinion is unreliable. Wesley also takes issue with Dr. Phelan's testimony, suggesting that Dr. Phelan is similarly unqualified and that his opinion is based on guesswork.

1. Nurse Lundstrom

Wesley argues that Nurse Lundstrom is not qualified to render an opinion as to the standard of nursing care on an obstetrical nursing unit because she is a neonatal nurse, has never worked a single shift on a labor and delivery floor, and has never taught obstetrical nursing. But, the Tenth Circuit has rejected the argument that a physician must be a specialist in a field to testify about subjects related to that field.[12] Instead, the dispositive issue is whether Nurse

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[9]Fed. R. Evid. 702 (Dec. 1, 2000) (advisory committee notes); *Burton,* 183 F. Supp. 2d at 1311.

[10]*Id.* (quoting *Daubert,* 509 U.S. at 595).

[11]*United States v. Simpson,* 7 F.3d 186, 188 (10th Cir. 1993).

[12]*Burton,* 183 F. Supp. 2d at 1312 (quoting *Quinton v. Farmland Indus., Inc.*, 928 F.2d 335, 336 (10th Cir. 1991). The Kansas Supreme Court has similarly rejected this argument. *See Glassman v. Costello*, 986 P.2d 1050, 1057 (Kan. 1999) (noting that the Court has held that "one medical doctor may testify as to the standard of care applicable to another, irrespective of the area of specialization of either").

Lundstrom "testifie[d] within the reasonable confines of . . . her subject area."[13]

Nurse Lundstrom is a registered nurse, as well as a nurse practitioner. As a head nurse, charge nurse and staff nurse at Children's Mercy Hospital from 1973-1979, she made nursing assignments. Nurse Lundstrom also made assignments at the newborn intensive unit at Wesley from 1979-1989. Additionally, she has attended seminars on leadership and management, which included discussions of nurse staffing. Before rendering her opinion, Nurse Lundstrom consulted the Perinatal Guidelines and the Association of Women's Health, Obstetric and Neonatal Nurses publication on electronic fetal monitoring, in addition to the various nursing policies of Wesley. Nurse Lundstrom's education, experience and training qualifies her to testify about nurse understaffing. The fact that Nurse Lundstrom works in the neonatal unit, rather than on the labor and delivery floor, does not preclude her from testifying about the standard of nursing care on an obstetrical nursing unit. Any alleged gap in Nurse Lundstrom's qualifications goes to the weight of her expert opinion and can be addressed by cross examination.[14]

Wesley contends that even if Nurse Lundstrom is qualified to testify, her opinions on understaffing are based solely on assumptions; because there is no basis for Nurse Lundstrom's testimony, Wesley reasons that Nurse Lundstrom would simply be speculating that the nursing care provided to plaintiffs fell below the standard of care. To support this argument, Wesley stresses testimony from Nurse Lundstrom's first deposition, in which she stated that she believed that Wesley was understaffed, but that this belief was based purely on speculation. Nurse

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[13]*Burton*, 183 F. Supp. 2d at 1312.

[14]*Id*. ("Gaps in an expert witness's qualifications or knowledge generally go to the weight of the witness's testimony, not to its admissibility.").

Lundstrom's first deposition, however, was given before plaintiffs had added a nurse understaffing claim to the Amended Complaint, before any information regarding the claim had been provided to Nurse Lundstrom, and, most importantly, before Nurse Lundstrom was even asked to render an opinion on the issue. Wesley's citation of Nurse Lundstrom's first deposition is, at best, disingenuous.

In her first expert report, dated September 30, 2001, Nurse Lundstrom describes the materials she reviewed in reaching her conclusions. The materials included: (1) Mrs. Holt's and Kimberlyn Holt's medical records; (2) fetal monitor strips; (3) the depositions of Drs. Depew, Harris, and Klingler; and (4) the depositions of nurses Finley, Betzen, Denton, Dudley and Harder. After being asked to render an opinion on nurse understaffing, Nurse Lundstrom prepared a second expert report, dated February 13, 2002. In addition to the information reviewed in preparation of her first report, Nurse Lundstrom reviewed: (1) a letter from John Gibson date 3/5/01; (2) the patient assignment list from 7/29/98; (3) the nursing Birthroom records of a second patient cared for by Nurse Betzen while attending Mrs. Holt; (4) five Wesley Medical Center Nursing Policies; and (5) Guidelines for Perinatal Care, and Fetal Heart Rate Monitoring: Principles & Practice. Clearly, Nurse Lundstrom's expert opinions were not based on mere speculation.

Wesley also argues that Nurse Lundstrom's testimony is not based on scientific knowledge. While a relevant factor in the determination to admit expert scientific testimony includes whether the subject of the testimony is to be based on scientific knowledge, Nurse Lundstrom is not offering "expert scientific testimony," but non-scientific expert testimony. When non-scientific expert testimony is offered, a court must still ensure that the evidence is

reliable. Nurse Lundstrom's testimony is reliable; she has supported her conclusion with specific evidence, including Mrs. Holt's medical charts, which showed that the nurses failed to take and record vital signs as required by nursing policies, the patient assignment lists showing that a nurse assigned to Mrs. Holt was also assigned to a different patient and frequent nurse staff changes taking place. Given that the exclusion of expert evidence is the exception rather than the rule, the Court denies Wesley's motion to exclude Nurse Lundstrom's expert opinions.

2. Dr. Phelan

Wesley argues that Dr. Phelan is similarly ill-equipped to render an opinion on nurse understaffing because, as a physician, he lacks any credentials that would qualify him as an expert on nurse staffing and that his only experience with nurse staffing deals with critically ill pregnant women. First, the Court notes that it is well-established that a physician may testify as to the standard of care for nurses provided that the physician is otherwise qualified.[15] Dr. Phelan is otherwise qualified; he testified that as an obstetrician-perinatologist, he works with nurses on a regular and ongoing basis, and has taught nursing classes in the past. Additionally, he has been involved in staffing in the labor and delivery unit; on occasions when there have been insufficient nurses on the floor, he has called nurses from home and asked them to come to the hospital. Dr Phelan has assisted in completing a nurse staffing schedule for critically ill pregnant women and authored policies on the staffing of an obstetrics unit dealing with critically ill pregnant women at two hospitals in his capacity as co-director of maternal-fetal medical. The fact that Dr. Phelan is most familiar with staffing relating to critically ill women, does not render him unqualified to

[15]*See Nold ex rel. Nold v. Binyon*, 31 P.3d 274, 284 (Kan. 2001).

testify as to staffing issues on the labor and delivery floor.[16] Any alleged insufficiencies in Dr. Phelan's qualifications may be adequately addressed on cross examination.

Wesley also argues that Dr. Phelan's opinion is mere speculation and guesswork because he has not relied on a single national guideline, or uncovered any fact that suggested Wesley was understaffed. But, Dr. Phelan did refer to specific facts in reaching his conclusion. He testified that one-on-one care was necessary after Mrs. Holt was administered Cervidil and definitely after Pitocin was started; he pinpointed the exact time in which he believed Mrs. Holt should have begun receiving one-on-one nursing care. And, Dr. Phelan described two instances in which one-on-one care was not provided to Mrs. Holt. He noted that Nurse Betzen had two patients during her shift and that Nurse Finley was acting as a charge nurse and leaving Mrs. Holt unattended for periods of time. Thus, Dr. Phelan did not refer to the overall picture and "guess" as Wesley states; instead, Dr. Phelan identified specific instances in which Mrs. Holt was not receiving one-on-one nursing care in the course of his analysis. The Court concludes that Dr. Phelan's opinion is helpful to the trier of fact, and, therefore, admissible.

III. Summary Judgment Motion

A. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of

[16]*See Burton,* 183 F. Supp. 2d at 1312.

law."[17] The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[18] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[19]

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be met by showing that there is a lack of evidence to support the nonmoving party's case.[20] Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial.[21] "A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of [its] pleading, but must set forth specific facts showing that there is a genuine issue for trial."[22] Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.[23] The Court must consider the record in the light most favorable to the nonmoving party.[24]

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[17]Fed. R. Civ. P. 56(c).

[18]*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[19]*Id.* at 251-52.

[20]*See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[21]*See Anderson*, 477 U.S. at 256.

[22]*Id.*

[23]*See id.*

[24]*See Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied* 469 U.S. 1214 (1985).

The Court notes that summary judgment is not a "disfavored procedural shortcut"; rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[25]

B. Discussion

Wesley argues that it is entitled to summary judgment on plaintiffs' claims of (1) negligence stemming from nurse understaffing; (2) joint enterprise; (3) breach of contract; and (4) punitive damages.

1. Nurse Understaffing

Wesley contends that: (1) neither Dr. Phelan nor Nurse Lundstrom are qualified to testify as experts; and (2) plaintiffs have failed to produce expert evidence on the issue of nurse understaffing. Wesley's arguments related to the qualification of experts parrot those in its motion to exclude testimony, which the Court has already denied, so the Court need not revisit this issue.

Under Kansas law, to establish a claim of medical malpractice, a plaintiff must show that the defendant owed him a duty, that the defendant breached this duty, and that a causal connection exists between the breach and plaintiff's injuries.[26] To meet this burden, plaintiff ordinarily must produce expert medical testimony on all three elements: duty of care, breach and causation of injury.[27] The common knowledge exception allows plaintiff to prove the standard

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[25] *Celotex,* 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

[26] *Sharples v. Roberts,* 816 P.2d 390, 397 (Kan. 1991); *Calwell v. Hassan*, 925 P.2d 422, 428 (Kan. 1996).

[27] *Sharples*, at 397-98.

of care and causation without expert testimony but only "where the lack of reasonable care or the existence of proximate cause is apparent to the average layman from common knowledge or experience."[28] Plaintiffs do not assert that this exception applies; thus to survive summary judgment, plaintiffs must produce expert testimony on all three elements. Wesley argues that plaintiffs' claim fail because the expert testimony from Dr. Phelan and Nurse Lundstrom fails to satisfy the element of causation on plaintiffs' claim for nurse understaffing.

a. Nurse Lundstrom

Wesley argues that Nurse Lundstrom's testimony on causation is inadequate because she has no evidence to support her opinions. Nurse Lundstrom testified that there was either nurse understaffing or bad nursing care. She based this opinion on specific evidence: medical records; patient assignment lists; and frequent nurse staff changes. Nurse Lundstrom testified that, in her opinion, the lack of one-on-one nursing interfered with Mrs. Holt's care. Although Nurse Lundstrom admitted she was unaware of any testimony that a nurse not being at Mrs. Holt's bedside interfered with the physician's ability to provide care, this does not mean, as Wesley urges, that Nurse Lundstrom failed to provide testimony on causation. Rather, it simply indicates that Nurse Lundstrom based her conclusion on other evidence. The Court concludes that Nurse Lundstrom's testimony is helpful to the trier of fact and admissible under Rule 702.

b. Dr. Phelan

Wesley likewise avers that Dr. Phelan's testimony on causation is insufficient because he "could not refer to any specific instance where the lack of one-on-one nursing care caused or

[28] *Id.* at 395(citing *Webb v. Lungstrum*, 575 P.2d 22, 25 (Kan. 1978)).

contributed to the outcome. Dr. Phelan testified that, at a certain point in Mrs. Holt's care, one-on-one nursing care was required, but that such care was not provided. In his deposition, Dr. Phelan testified that the lack of one-on-one care contributed to Kimberlyn's condition. Moreover, in his expert report dated February 19, 2002, he stated that:

> It is in my opinion that there was, indeed nurse 'understaffing' on the part of the defendant Wesley Medical Center, based on an evaluation of 'patient acuity/classification' and the lack of 'continuity of patient care.' Mrs. Holt was a 'High Risk' or 'Special Needs' patient. It is further my opinion, to a degree of medical probability, that this nurse 'understaffing' caused and/or contributed to the eventual outcome in this case.

Dr. Phelan identified specific instances in which Mrs. Holt was not receiving one-on-one nursing care and concluded that the lack of the nursing care caused plaintiffs' damages. In sum, plaintiffs have adduced sufficient evidence on the issue of causation on plaintiffs' claim of negligence due to understaffing; Wesley's motion for summary judgment on this claim fails.

2. Joint Enterprise

Wesley argues that it is entitled to summary judgment on the issue of joint enterprise because (1) the issue sounds in vicarious liability and, as a health care provider under Kansas law, it cannot be vicariously liable for the negligence of other health care providers; (2) joint enterprise is a basis for establishing liability and not an independent cause of action; and (3) plaintiffs have failed to establish the substantive elements of a joint enterprise.

a. Vicarious Liability

Plaintiffs argue that a joint enterprise was formed between Wesley and WCGME, such that the negligence of one entity may be imputed to the other. Defendants counter that because

both WCGME and Wesley are health care providers under Kansas law, neither is liable for the acts of the other.

Prior to July 1, 2001, WCGME was not included within the definition of a health care provider pursuant to K.S.A. 40-3401(f) and was, therefore, vicariously liable for the negligent acts or omissions of its resident physician employees pursuant to K.S.A. 40-3403(h). In 2001, the legislature amended the definition of a health care provider to include WCGME. Plaintiffs argued that the retroactive application of the amendment deprived them of a vested property right, violated their substantive due process rights and violated the equal protection clause of the United States and Kansas Constitutions.

Subsequently, this Court certified the following question to the Kansas Supreme Court: "Does the retroactive application . . . amending K.S.A. 40-3401(f) and K.S.A. 40-3403(h) . . . deprive plaintiffs of a vested property right and violate § 18 of the Bill of Rights of the Kansas Constitution and, in addition, violate the Equal Protection Clause of § 1 of the Bill of Rights of the Kansas Constitution?" The court held that the retroactive application deprives plaintiffs of a vested property right and violates § 18 of the Bill of Rights of the Kansas Constitution, but it does not violate the Equal Protection Clause of § 1 of the Bill of Rights of the Kansas Constitution. Because the Kansas Supreme Court held unconstitutional the retroactive application of the amendments naming WCGME a health care provider, and thereby insulating Wesley from vicarious liability, Wesley's reliance on the amendments to avoid liability fails.

b. Joint Enterprise is not an Independent Cause of Action

Wesley argues that plaintiffs' claim for negligence in entering into a joint enterprise with

WCGME fails to state a legal cause of action because joint enterprise is a theory of liability and not a cause of action. The Court agrees; joint enterprise is "a contractual relationship of mutual agency employed to represent merely a unity between persons in the pursuit of a common purpose, as a result of which the negligence of one participant may be imputed to another," not an independent cause of action.[29] To the extent plaintiffs seek to impose joint liability on entities who have formed a joint enterprise on a valid cause of action, summary judgment is improper. However, summary judgment must be granted on plaintiffs' cause of action that WCGME was negligent in entering into a joint enterprise with Wesley Medical Center.

c. Substantive Elements

WCGME suggests that summary judgment is proper because plaintiffs have not established the requisite elements of a joint enterprise between it and Wesley Medical Center. To establish a joint enterprise, four elements must be present: (1) an agreement; (2) a common purpose; (3) a community of interest; and (4) an equal right to a voice, accompanied by an equal right of control over the instrumentality.[30] When the undisputed facts show that any of the four elements are lacking, summary judgment may be granted.[31]

Wesley contends that plaintiffs can point to no acts which meet the definition of a joint enterprise with regard to the care they received, and that under plaintiffs' theory, every time doctors, nurses and technicians worked together to provide patient care, a joint enterprise would

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[29]46 Am. Jur. 2d. Joint Ventures § 6 (West 2004).

[30]*Gragg v. Wichita State Univ.*, 934 P.2d 121, 131 (Kan. 1997).

[31]*See, e.g. Cullip ex rel. Pitts v. Domann ex rel. Domann*, 972 P.2d 776, 783 (Kan. 1999).

be established sufficient to hold one accountable for the acts of the other. Plaintiffs are not, however, claiming that WCGME and Wesley formed a joint enterprise in providing care to plaintiffs. Rather, plaintiffs argue that the entities formed a joint enterprise in the administration of the residency program; Wesley's argument is simply inapposite.

3. Breach of Contract

Wesley argues that plaintiffs may not bring a claim for breach of the admission agreement because a plaintiff may not bring a breach of contract claim in a medical malpractice suit. Kansas law is clear that "certain duties and obligation are imposed on hospitals and physicians by law, breach of those duties is malpractice, and damages are in tort, even if there is an express contract between the parties."[32] If, however, a physician or hospital enter into an agreement in which they "otherwise obligate themselves above and beyond their ordinary duties," by entering into a special contract or making an express warranty, a plaintiff may bring an action for breach of contract.[33] For instance, in *Noel v. Proud*, the Court permitted the plaintiff to sue on a special contract which promised that "while the operations might not have any beneficial effect, the plaintiff's hearing would not be worsened as a result of the operations."[34]

Plaintiffs assert that, as in *Noel,* a special contract existed between the hospital and plaintiffs in the form of the Admission Agreement. Specifically, plaintiffs argue that Wesley expressly warranted that residents participating in the care and treatment of plaintiffs, would do

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[32]*Crockett v. Medicalodges, Inc.*, 799 P.2d 1022, 1028 (Kan. 1990); *Malone v. Univ. of Kan. Med. Ctr.*, 552 P.2d 885, 888 (Kan. 1976).

[33]*Noel v. Proud*, 367 P.2d 61, 64 (1961); *Malone,* 552 P.2d at 888.

[34]*Noel*, 367 P.2d at 66.

so "under the supervision of attending physicians." However, the Admission Agreement is not a special contract; Wesley never agreed to obtain particular results, or made any express warranty above and beyond its ordinary duties. Indeed, the Admission Agreement was not specially provided to Mrs. Holt, but rather is a form provided to all patients upon admission. Plaintiffs' claims clearly sound not in contract, but in tort. As a result, the Court grants Wesley's motion for summary judgment on plaintiffs' breach of contract claim.

4. Punitive Damages

Lastly, Wesley asserts that it is entitled to summary judgment on plaintiffs' punitive damages claim for two reasons. First, Wesley states that the evidence shows that it did not act in a wanton manner. Second, Wesley states that even if the plaintiffs had evidence of wanton conduct, punitive damages will still not be recoverable because there is no evidence that the wanton conduct was authorized or ratified by anyone expressly empowered to do so.

a. Wanton Conduct

In Kansas, punitive damages are awarded to punish the wrongdoer for malicious, vindictive, or willful or wanton invasion of the injured party's rights with the ultimate purpose being to restrain and deter others from the commission of similar wrongs.[35] To warrant an award of punitive damages, a party must prove by clear and convincing evidence that the party against whom the damages are sought acted with willful or wanton conduct, fraud or malice.[36] Wantonness refers to the mental attitude of a wrongdoer rather than a particular act of

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[35]*Cerretti v. Flint Hills Rural Elec. Co-op Ass'n*, 837 P.2d 330, 344 (Kan. 1992).

[36]K.S.A. § 60-3702(c); *Reeves v. Carlson*, 969 P.2d 252, 255 (Kan. 1998)

negligence.[37] A wanton act is "something more than ordinary negligence but less than a willful act. It must indicate a realization of the imminence of danger and a reckless disregard or indifference to the consequences."[38] Both acts of omission as well as acts of commission can be wanton since reckless disregard and indifference are characterized by failure to act when action is called for to prevent injury.[39] Generally, if reasonable minds could differ, then whether a person acted wantonly is a question of fact to be determined by the trier of fact.[40]

Wesley argues that there is no evidence of wanton conduct because Nurse Lundstrom stated that she did not want to believe that the nurses were "bad nurses," and thought it was more logical to conclude that understaffing caused plaintiffs' problems. Additionally, Nurse Lundstrom stated that she has no evidence that any of the nurses involved did not care about Mrs. Holt's well being. Wesley misunderstands the meaning of wanton conduct; it is unnecessary for plaintiffs to prove that the nurses were "bad," or professed not to care about plaintiffs. Instead, "[i]t is sufficient if the defendant evinced that degree of indifference to the rights of others which may justly be characterized as reckless. Recklessness is a stronger term than negligence. To be reckless, conduct must be such as to show disregard of or indifference to consequences, under circumstances involving danger to life or safety of others."[41] This plaintiffs have done; Nurse Lundstrom's expert report, provides that:

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[37]*Reeves*, 969 P.2d at 256.

[38]*Cerretti,* 837 P.2d at 346.

[39]*Gould v. Taco Bell*, 722 P.2d 511, 518 (Kan. 1986)

[40]*Bowman v. Doherty*, 686 P.2d 112, 119 (Kan. 1984).

[41]*Reeves*, 969 P.2d at 256.

> I found it especially egregious that as early as 5:20 a.m., nearly 12 hours before the infant was delivered, the nurse increased the Pitocin despite the ominous sign of a repetitive late deceleration pattern. The lowest standard of care would have been to stop the Pitocin at that time. Instead, *the Pitocin was recklessly increased, showing total disregard for the well-being of the fetus and the mother*.
>
> * * *
>
> Of additional concern is the fact that over five liters of fluid were given to Mrs. Holt with almost no urine return. When fluid was obtained it was grossly bloody and of small volume. *Not relaying this abnormal information to the attending physician was reckless and falls far below the acceptable standard of care practices of nurses*, regardless of the area in which they work.

In addition, plaintiffs point to alterations or additions to Mrs. Holt's medical records made on August 22, 1998. The addendum, prepared by Nurse Finley, modified Mrs. Holt's July 30, 1998 medical records to include three specific reports to Dr. Harris by Nurse Finley of low urine output and bloody urine at 11:55 a.m., 12:45 p.m., and 1:50 p.m., respectively. The addendum also included a report of left-sided break through pain while block levels were equal at 1:50 p.m. In her deposition, Nurse Finley stated that the addendum was prepared for liability reasons, not for the patient's well-being. Viewing the evidence in the light most favorable to plaintiffs, there is evidence that defendants acted in a wanton manner.

b. Authorized or Ratified by Wesley

Even though plaintiffs have shown evidence of Wesley's wanton conduct, they must still show that the questioned conduct, here the nurses' actions, were authorized or ratified by a person empowered to do so, as required by K.S.A. § 60-3702(d). The statute provides that:

> (d) In no case shall exemplary or punitive damages be assessed pursuant to this section against:
> (1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified expressly by a person empowered to

do so on behalf of the principal or employer . . . .[42]

Although the statute ostensibly requires express authorization, the Kansas Supreme Court has held that "authorization under the provisions of [the statute] may be either express or implied and generally is accomplished before or during the employee's questioned conduct."[43] "It may be based on an express grant of authority or on a course of conduct indicating that the employee was empowered or given the right or authority to engage in the questioned conduct."[44]

Likewise, ratification under the provisions of K.S.A. 60-3701(d)(1) may be either express or implied and may be accomplished before, during, or after the employee's questioned conduct.[45] "It may be based on an express ratification or based on a course of conduct indicating the approval, sanctioning, or confirmation of the questioned conduct"[46] In addition, it is well-settled that a corporation is liable for punitive damages for the tortious acts of a managerial agent acting within the scope of his employment,[47] as ratification and authorization are broad enough to encompass evidence that the corporate defendants knew or should have known about employee misconduct and evidence of corporate policies, procedures, or managerial behavior that a jury reasonably could infer implicitly authorized or ratified the questioned conduct.[48]

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[42]K.S.A. 60-3072(d).

[43]*Smith v. Printup*, 866 P.2d 985, 1003 (Kan. 1993).

[44]*Id.*

[45]*Id.*

[46]*Id.*

[47]*Flint Hills Rural Elec. Co-op Ass'n v. Federated Rural Elec. Ins. Corp.*, 941 P.2d 374, 380 (Kan. 1997); *see also, Lowe v. Surpas Res. Corp.*, 253 F. Supp. 2d 1209, 1256 (D. Kan. 2003)

[48]*Smith*, 866 P.2d at 1005.

Wesley argues that it did not authorize or ratify the nurses' conduct because there is no evidence that the hospital knew of the nurses' improper actions and condoned them. Plaintiffs suggest that Nurse Riley's status as a charge nurse and clinical advisor rendered her a managerial agent, and her violations of nursing policies and procedures while serving in the position of a charge nurse renders Wesley liable for punitive damages. As a charge nurse, Riley was responsible for the other nurses on the floor during Mrs. Holt's labor and delivery. In her capacity as a clinical advisor, Nurse Riley scheduled the staff, including the assignment of nurses to particular patients. The Court concludes that, by virtue of her position as a charge nurse and clerical advisor, Nurse Riley was a managerial agent and that plaintiffs have shown sufficient facts suggesting that Nurse Riley committing tortious acts while acting in the scope of her employment with Wesley to avoid summary judgment.

IT IS THEREFORE ORDERED BY THE COURT that Wesley's *Daubert* Motion (Doc. 296) is DENIED.

IT IS FURTHER ORDERED BY THE COURT that Wesley's Motion for Summary Judgment (Doc. 297) is GRANTED IN PART AND DENIED IN PART.

IT IS SO ORDERED.

Dated this 19th day of July, 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge